No. 78-713

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

SEA-LAND SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WADE H. McCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

LEONARD SCHAITMAN
ELOISE E. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530

JOSEPH N. INGOLIA
General Counsel

EDWARD G. GRUIS
Deputy General Counsel

CAROL J. NEUSTADT
Attorney
Federal Maritime Commission
Washington, D.C. 20573

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' order (App. A, *infra*, 1a-2a) is unreported. The district court's opinion (App. C, *infra*, 4a-15a) is reported at 424 F. Supp. 1008.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1978 (App. A, *infra*, 1a-2a). A petition for rehearing was denied on June 30, 1978 (App. B,

infra, 3a). On September 19, 1978, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including October 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals has jurisdiction to hear an appeal from a judgment drawn up by government counsel at the district judge's request, where the United States accepted payment in satisfaction of the portion of the judgment that was no longer in dispute.

STATUTE INVOLVED

28 U.S.C. 1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

STATEMENT

The United States brought this action against Sea-Land Service, Inc., a water carrier engaged in the Atlantic Coast-Puerto Rico trade, seeking to recover civil penalties authorized by the Shipping Acts (46 U.S.C. (Supp. V) 831(c) and 844). The statutes authorize a penalty of as much as $1,000 for each day of a continuing violation. The United States argued that respondent violated its tariff throughout a 151-day period by refusing to provide containers to "consolidators," persons who aggregate small shipments so that they fill a shipping container. Respondent had filed a tariff amendment that would have allowed it to refuse to provide the containers, but the Federal Maritime Commission suspended this proposed change and instituted an investigation. Nevertheless respondent, which had signed a labor agreement in which it agreed to refuse to supply containers, abided by the labor agreement rather than by the terms of its tariff.

Respondent argued that there had been evidence of only five instances in which it had refused particular requests for containers during this 151-day period. The United States responded that this was not controlling because respondent would have refused any request, and its public unwillingness to supply containers made requests unlikely. The principal question for the district court, therefore, was whether the maximum fine was $151,000 ($1,000 for each day during which respondent adhered to the labor agreement that bound it to refuse to supply containers) or $5,000 ($1,000 for each express refusal to comply with an explicit request by a consolidator for containers).[1]

[1] This is the first action instituted on behalf of the Federal Maritime Commission against a carrier in which the continuing nature of the violation and the meaning of the statutory language authorizing penalties "for each day such violation continues" (46 U.S.C. (Supp. V) 831(c), 844) has been placed in issue. Both Sections authorize a civil penalty of up to $1,000 for each day that a violation continues. The district court's opinion, which holds that a specific request for and denial of a service which the carrier has agreed to provide by its tariff must be shown for each day that a violation is alleged to have continued, will severely restrict the reach of these provisions. The Federal Maritime Commission believes that proof of a carrier's adherence to an announced policy terminating

The district court agreed with respondent (App. C, *infra*, 4a-15a), and it instructed government counsel to submit an appropriate order (*id.* at 15a). In accordance with the court's opinion, government counsel drew up an order awarding the United States "$5,000, with interest to be computed from the date of this judgment" (App. D, *infra*, 16a). Both parties subscribed their "consent to the entry" of that judgment, which was then entered by the district court (*ibid.*).

Within ten days after the district court clerk's entry of the judgment [2] the United States moved for reconsideration of the court's decision insofar as it had declined to find respondent guilty of a continuing 151-day violation of the Shipping Acts (see App. G, *infra*, 21a-22a). At the hearing on this motion, the district court commented in passing that the form of the order was ambiguous and could be read as giving consent to the substance of the judgment, as well as

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the services in question should be sufficient to establish a continuing violation for so long as the carrier adheres to that policy, or its tariff remains unchanged. If it were otherwise, proof of continuing violations would present an insurmountable hurdle for the Commission, because there will be few requests by consumers for services that a carrier has publicly announced that it will not provide. The question of what constitutes a continuing violation is therefore one of importance to the Commission.

[2] The clerk's entry read (App. E, *infra*, 18a):

> There was entered on the docket on 3-22-77 a consent (judgment) for $5,000 with costs.

the form of the order.[3] Neither party responded to this comment. The court then considered the motion on its merits and orally reaffirmed its opinion and judgment.[4] The court subsequently advised the parties by letter to disregard its suggestion during the course of the hearing that the motion for rehearing might not have been timely; the court reiterated that it was denying the government's motion for the reasons stated at the hearing, "which go to the merits of the issue raised" (*id.* at 22a). Respondent then tendered and the government accepted payment of $5,000 in satisfaction of the portion of the government's claim that was no longer at issue (App. F, *infra*, 19a-20a).

The United States then filed a timely notice of appeal. Its appellate brief raised the question whether the violation had continued throughout the 151-day period, making a fine of $151,000 appropriate. Respondent's brief, in addition to addressing the merits, argued that the parties had entered a "consent judgment," which had been paid and satisfied, from which

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[3] The court commented:

> Parenthetically I note that counsel said we hereby consent to the entry of the foregoing judgment.
>
> I wonder if that was really meant to be only to the form of it, because counsel has consented to a $5,000 judgment. It looks like he acquiesced in a decision. I will leave that for another day.

C.T. App. 558. ("C.T. App." refers to the Appendix filed in the court of appeals.)

[4] C.T. App. 558-561.

no appeal would lie.[5] The government argued in reply that the judgment was not a "consent judgment," because it was not a judgment arrived at by agreement of the parties, but rather was a judgment rendered by the court to which the parties had merely subscribed their formal consent. The government also urged that its acceptance of payment of $5,000 for the five discrete violations no longer in dispute had not foreclosed its right of appeal from the court's denial of its claim for an additional $146,000.[6]

The court of appeals limited oral argument to the jurisdictional issue; the judges indicated that they were disturbed both by the form of the judgment entered, which did not indicate on its face that government counsel's consent was "as to form only," and by the government's acceptance of the $5,000 payment. On the day of argument the court entered a judgment order dismissing the appeal, without opinion, for lack of jurisdiction (App. A, *infra*, 1a-2a).

The government filed a timely petition for rehearing and an affidavit from its counsel explaining the circumstances of the entry of judgment and his acceptance of payment (App. H, *infra*, 24a-27a). Counsel stated that "the judgment was intended to show that counsel agreed to the statement of the Court's decision" (*id.* at 25a) and that he had accepted payment of the $5,000 at respondent's request so that

[5] Appellee's Brief at 11-12. This was the first time respondent had characterized the judgment as a "consent judgment."

[6] Appellant's Reply Brief at 1-2; 4-7.

respondent could avoid an obligation to pay interest on the judgment (*id.* at 26a). Counsel's affidavit concluded (*id.* at 26a-27a):

> Admittedly, the pleadings entered in the District Court could have been more appropriately phrased. There was, however, no intent at any time by the Government to acknowledge any agreement with or acceptance of the decision by the District Court in this case. I am of the firm conviction that no such intent was ever communicated to counsel for [respondent] and I am also of the firm conviction that they were fully aware throughout that I myself, and counsel for the Federal Maritime Commission, disagreed with the District Court's opinion and that no actions by me were in any way intended to preclude the Government from moving for reconsideration or appealing the decision of Judge Meanor.

The court of appeals denied the petition for rehearing without requesting a response (App. B, *infra*, 3a).

REASONS FOR GRANTING THE PETITION

1. The principal dispute in this case has been about $146,000—the difference between the maximum fine on the United States' theory of the case and the maximum fine on respondent's theory of the case. The district court, having agreed with respondent, ordered government counsel to prepare an appropriate judgment that would award the United States only $5,000. Counsel did so, and the judgment was entered. Respondent paid the sum no longer in dis-

pute, and the United States appealed, seeking enlargement of the judgment by the disputed $146,000. Without explaining why it did so, the court of appeals dismissed the appeal.

The court of appeals apparently determined that the United States had somehow unwittingly forfeited its right to appeal. Because the court did not write an opinion, however, the United States, which files hundreds of appeals every year, does not know what is required to prevent the dismissal of appeals in the future. It does not know whether it must refuse to draft the judgment, refuse to accept payment of a judgment, or file a paper denying that it consents to the judgment it wrote. A dismissal for want of jurisdiction is of special concern to the United States because of the volume of litigation it conducts. Indeed, it should be of concern to all litigants for, as this Court has repeatedly stated, the rules governing the scope of appellate jurisdiction should be clear and capable of mechanical application.[7] It is anything but clear, however, why the court of appeals dismissed the appeal here.

The judges of the court of appeals expressed two concerns at oral argument. They asked whether the judgment, drawn up by government counsel, might be a consent judgment that the parties cannot later appeal. They also asked whether the United States'

[7] See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, No. 76-1836 (June 21, 1978), slip op. 7-10; *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-387 (1978); *Browder* v. *Director*, 434 U.S. 257, 264, 268-271 (1978).

acceptance of $5,000 in satisfaction of the portion of the claim that is no longer in dispute would bar an appeal from the district court's refusal to award a larger sum. As we argue below, neither of these concerns affects the court's jurisdiction. Indeed, principles that have been understood for many decades establish that the court of appeals was required to decide the case on the merits. Because the disposition of this case draws into question the court of appeals' adherence to settled principles, and because its unexplained order introduces an element of real doubt into the standards of appellate jurisdiction, this Court should grant review and remove the uncertainty. In our view, the court of appeals' error is so clear that it would be appropriate for the Court summarily to reverse the judgment, as it has done in numerous recent cases involving questions of jurisdiction and judicial administration.[8]

[8] See, *e.g.*, *Proctor* v. *Warden*, No. 77-5898 (April 17, 1978) (court of appeals' issuance of opinion showing that it may not have considered the case); *Smith* v. *Digmon*, 434 U.S. 332 (1978) (district court jurisdiction of petitions for habeas corpus); *Chase Manhattan Bank* v. *South Acres Development Co.*, 434 U.S. 236 (1978) (jurisdiction of the District Court of Guam); *Ashcroft* v. *Mattis*, 431 U.S. 171 (1977) (federal jurisdiction to issue declaratory judgment); *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (appellate jurisdiction to review orders remanding cases to state courts); *Morales* v. *Turman*, 430 U.S. 322 (1977) (appellate jurisdiction to review declaratory judgment invalidating state practices); *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977) (appellate jurisdiction to review remittitur); *United States* v. *Dieter*, 429 U.S. 6 (1976) (appellate jurisdiction when notice of appeal is filed after district court denies reconsider-

2. The record in the district court, as supplemented by the uncontradicted affidavit of the government's attorney, establishes that the judgment of that court is not a "consent judgment." A consent judgment is one whose terms and conditions are settled and agreed to by the parties; it is, in essence, an agreement or contract between the parties that is entered with the sanction or approval of the court.[9] There was no such agreement here. The case was fully litigated, and the terms of the order were set by the court. At the court's express request government counsel drafted an order that—whatever ambiguities were introduced by the use of the word "consent"—was understood by respondent and the district court as stating the

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ation); *United States* v. *Morrison*, 429 U.S. 1 (1976) (appellate jurisdiction to review acquittal in criminal case); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (scope of appellate authority to review dismissal for failure to make discovery); *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479 (1976) (scope of arguments open to appellee); *National Bank of North America* v. *Associates of Obstetrics*, 425 U.S. 460 (1976) (venue in national bank cases); *Bray* v. *United States*, 423 U.S. 73 (1975) (appellate jurisdiction of Temporary Emergency Court of Appeals); *Day & Zimmerman, Inc.* v. *Challoner*, 423 U.S. 3 (1975) (choice of law rules in diversity cases).

[9] *United States* v. *Kellum*, 523 F.2d 1284, 1287 (5th Cir. 1975); *Crowe* v. *Cherokee Wonderland, Inc.*, 379 F.2d 51, 54 (4th Cir. 1967); *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283, 284 (2d Cir. 1962); *Traveler's Insurance Co.* v. *United States*, 283 F. Supp. 14, 28 (S.D. Tex. 1968); *United States* v. *Southern Ry.*, 278 F. Supp. 60 (W.D. N.C. 1967); *Redevelopment Comm'n. of Greenville* v. *Hannaford*, 29 N.C. App. 1, 222 S.E. 2d 752, 753 (1976). See *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975).

government's consent to the form of the judgment only.

The United States vigorously pressed its argument that respondent had been guilty of a continuing violation, and within days of the court's opinion rejecting that argument counsel discussed the procedures for the government's appeal (App. H, *infra*, 24a-25a). Government counsel drafted the order only because he was directed to do so by the district court (App. C, *infra*, 15a). Within 10 days of the entry of the judgment, the government filed a motion for reconsideration. Respondent did not oppose that motion on the ground that a consent judgment had been entered —even when the court noted that the order was ambiguous and could be read as a consent judgment. Nor did the district court treat the judgment as a consent judgment; to the contrary, it explicitly denied the government's motion for reconsideration "for * * * reasons * * * which go to the merits of the issue raised" (App. G, *infra*, 22a).[10] The United States promptly appealed. It is inconceivable that this sequence of events reflects the consent of the United States to the extinguishment of its claim.

3. It is equally clear that the government's acceptance of payment of the $5,000 judgment did not affect the court of appeals' jurisdiction. As this Court stated in *United States* v. *Hougham*, 364 U.S. 310, 312 (1960):

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[10] Accordingly, the clerk's docket entry characterizing the judgment as a consent judgment (App. E, *infra*, 18a) is not controlling.

> It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim.

See also *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972). Government counsel's uncontradicted affidavit stated that, after the district court's initial opinion, respondent's counsel requested the United States to accept payment of the $5,000 that was no longer in dispute, to avoid the accumulation of interest on that sum (App. H, *infra*, 26a). The government's counsel agreed "with the understanding that it did not preclude us from filing an appeal," and respondent's counsel indicated he "understood [the government's] position" (*ibid.*).

It is well established that acceptance of the benefits of a judgment where, as here, there is no intention to settle a disputed claim, does not forfeit the right to appeal. As the court of appeals stated in *Gadsen* v. *Fripp*, 330 F.2d 545, 548 (4th Cir. 1964):

> When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise and settle a disputed claim, an appeal may be foreclosed, but, under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment.

Accord, *United States* v. *F. D. Rich Co.*, 525 F.2d 760, 764-765 (7th Cir. 1975); *diLeo* v. *Greenfield*, 541 F.2d 949, 952-954 (2d Cir. 1976); *Hawaiian Paradise Park Corp.* v. *Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969); 9 *Moore's Federal Practice* § 203.06 at 718-719 (2d ed. 1973). Indeed, in *United States* v. *F. D. Rich Co.*, *supra*, a case remarkably similar to the present one, the Seventh Circuit held that payment of a judgment to avoid accrual of interest would not foreclose an appeal.

4. Because neither of the grounds that troubled the court of appeals could affect its jurisdiction, the court's unexplained dismissal of the government's appeal violates settled principles regarding appellate jurisdiction. Review by this Court is necessary to remove the troubling uncertainty regarding the standards for appellate jurisdiction that has been created by the Third Circuit's summary action.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

LEONARD SCHAITMAN
ELOISE E. DAVIES
Attorneys

JOSEPH N. INGOLIA
General Counsel

EDWARD G. GRUIS
Deputy General Counsel

CAROL J. NEUSTADT
Attorney
Federal Maritime Commission

OCTOBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-2142

UNITED STATES OF AMERICA, APPELLANT,

vs.

SEA-LAND SERVICE, INC.

Appeal from the United States District Court for the District of New Jersey

(D.C. Civil No. 74-1664)

Argued May 22, 1978

Before: ALDISERT, GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed for lack of jurisdiction.
Costs taxed against appellant.

BY THE COURT,

/s/ Aldisert
Circuit Judge

Costs taxed in favor of appellee as follows:

Brief ---------- $181.28

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

DATED: May 22, 1978

Certified as a true copy and issued in lieu of a formal mandate on July 10, 1978.

Test:
THOMAS F. QUINN

Clerk, United States
Court of Appeals for
the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2142

UNITED STATES OF AMERICA, APPELLANT,

vs.

SEA-LAND SERVICE, INC.

Present: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges.

ORDER

After consideration of appellant's petition for rehearing before the original panel, it is ORDERED that said petition be and the same is hereby denied.

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: June 30, 1978

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-1664

UNITED STATES OF AMERICA, PLAINTIFF,

v.

SEA-LAND SERVICE, INC., DEFENDANT

Appearances:

Jonathan L. Goldstein, Esq.
United States Attorney
Attorney for Plaintiff
BY: Warren A. Schneider, Esq.
U.S. Department of Justice
Admiralty and Shipping Section
(New York, New York)
and
Carol J. Neustadt, Esq.
Federal Maritime Commission
(Washington, D.C.)

Meyner, Landis & Verdon
Attorneys for Defendant
BY: Jeffrey L. Reiner, Esq.
and
Ragan & Mason, Esqs.
(Of Counsel, D.C. Bar)
BY: Gerald A. Malia, Esq.

OPINION

MEANOR, District Judge.

This is a civil action wherein the United States seeks to recover a civil penalty for certain acts of

the defendant which are alleged to violate (1) the terms of its tariff on file with the Federal Maritime Commission (FMC), and (2) a suspension order issued by the FMC.

Sea-Land Service (SLS) is a common carrier by water. Before and during the relevant dates at issue it provided, among other services, containership services between Elizabeth, New Jersey, and Puerto Rico. This action concerns SLS's activities with certain "consolidators," or non-vessel-owning common carriers.

Consolidators are in the business of receiving small or less than container-load shipments from shippers, consolidating such shipments and "stuffing" them into containers furnished by carriers, and then forwarding the loaded containers to the carrier's terminal for ultimate transportation. SLS was a furnisher of such containers, and provided containership service according to tariff provisions filed by SLS with the FMC which were in effect at all times relevant herein. Typically, consolidators are not located on the waterfront, and containers, full or empty as the case may be, are conveyed by land transportation between the consolidation site and the docks.

Consolidation activities became a concern to the International Longshoremen's Association (ILA) which viewed the inland consolidation work as properly belonging to ILA members at the waterfront. In January 1973, the ILA met with the association representing SLS and other carriers, and an agreement was reached wherein the carriers agreed not

to supply containers to consolidators' facilities within 50 miles of a port unless such facilities were located on a pier where vessels normally dock. The carriers further agreed to pay penalties for containers furnished in contravention of the agreement.

On March 15, 1973, SLS commenced observance of the above agreement and denied containers to consolidators within a 50-mile radius. On the same date, SLS filed proposed amendments to its tariff with the FMC which were scheduled to become effective on April 14, 1973. The proposed amendments included the terms of the agreement made with the ILA. The amendments also included a provision authorizing SLS to pass on any penalty it incurred by supplying containers in breach of the ILA agreement to the consolidator receiving the containers.

On April 13, 1973, the FMC ordered an investigation into the lawfulness of the submitted tariff amendments, and also ordered the suspension of the amendments until August 13, 1973. The order did not suspend the tariff in effect prior to the submission of the amendments.

During the period between April 13 and August 14, 1973, SLS complied with the terms of the ILA agreement. Actual requests for containers which SLS refused to honor during this period, as reflected in the record before me, appear to be limited to five requests by a single consolidator, Consolidated Express, Inc. The record also reflects that during the first six months of 1973, SLS was assessed, and it

paid, $102,000 in penalties for alleged violations of the ILA agreement. These penalties were not passed on to the individual consolidators involved. The parties have stipulated that in refusing to supply containers, SLS acted not in reliance on the tariff provisions which had been suspended by the FMC, but rather on its labor agreement and on its tariff which predated the amendments and the suspension order.

On July 12, 1973, the consolidators' association filed a petition with the FMC alleging that SLS had not complied with the suspension order, and sought to have that order enforced. The FMC, realizing that the suspension order had effect for only one more month, and also aware that the NLRB was about to seek an injunction against the future observance of the ILA agreement, pursued no judicial relief at that time.[1]

On November 20, 1973, the FMC gave notice to SLS of a claim and demand for recovery of $120,000 for 120 or more alleged violations of its April 13 suspension order. On October 24, 1974, the United States instituted this action against SLS asserting a claim for alleged violations of § 2 of the Intercoastal Shipping Act, 46 U.S.C. §§ 844, and § 32 of the Shipping Act, 46 U.S.C. § 831.

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[1] The ILA agreement was ultimately enjoined by the NLRB on December 4, 1975, and that action has been affirmed by the Second Circuit. ILA v. NLRB, 537 F.2d 706 (2d Cir. 1976).

I

46 U.S.C. § 844 requires all common carriers by water in intercoastal commerce to file tariffs with the FMC, and provides that no common carrier shall

> deny to any person any privilege or facility, except in accordance with

said tariffs. This provisions goes on to state that

> (w)hoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

46 U.S.C. § 831(c) provides that

> (w)hoever violates any order, rule, or regulation of the Federal Maritime Commission made or issued in the exercise of its powers, duties, or functions, shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

In its complaint, the United States has charged that the defendant's compliance with the ILA agreement, despite the FMC suspension order during the 151-day period from March 15, 1973 to August 13, 1973, constitutes a violation of both of the above statutory provisions, and renders the defendant liable for a penalty of $151,000.

II

I find it unnecessary to go to the question of whether the defendant is liable for any penalty under 46 U.S.C. § 831 predicated on a violation of the FMC suspension order. For reasons stated below, I find

that the defendant has violated the terms of its tariff filed with the FMC. This alone is sufficient to justify the imposition of a penalty in this case.

I do not believe that Congress intended by adoption of both 46 U.S.C. § 831 and § 844 to render a carrier subject to liability for double penalties on facts such as presented in this case. From my reading of the complaint herein, which appears to set forth alternative theories for but a single recovery, the United States would seem to agree. Furthermore, I believe that the sole effect of the April 13 suspension order was to negate the viability of the proposed tariff amendments which the defendant had filed in March. This order created no affirmative duty on the part of the defendant in addition to those which otherwise existed by virtue of the defendant's tariff which predated the amendments, and which was unaffected by the suspension order. As such, the issue of liability in this case appropriately rests on the question of whether the acts of the defendant constitute a breach of the terms of its tariff in violation of 46 U.S.C. § 844, and not whether these acts violated the FMC suspension order.

III

Preliminarily, it should be noted that the obligation of common carriers to provide services is one which is rooted in our early common law. *American Trucking Ass'ns, Inc.* v. *Atchison, T., & S. F. Ry.*, 387 U.S. 397, 406 (1967). This duty runs not only to shippers, but to the public. As such, a carrier owes the public a continuing duty to exercise reasonable

efforts to maintain services, even when beset by labor controversies. *Railway Employees* v. *Florida East Coast Ry.*, 384 U.S. 238, 245 (1966). Congress has found it appropriate to codify this common law duty with respect to intercoastal carriers by requiring them to file tariffs with a regulatory agency, and subjecting them to suit by the United States for civil penalties if they should deny services in derogation of these tariffs. 46 U.S.C. § 844.

Item 570 of the defendant's tariff (Section 1-1st revised page 124), entitled "REMOVAL OF CARRIER'S TRAILER BY SHIPPER OR CONSIGNEE FOR LOADING OR UNLOADING" controls the instant action. It provides in part:

> When prior arrangements have been made with the carrier, trailers may be removed from the terminals of the carrier, by Shipper or Consignee for loading and unloading . . . .

The defendant has maintained that the "prior arrangements" language of this provision affords a certain measure of discretion in whether it is obligated to comply with requests for containership services. The parties have stipulated that such requests would be declined under this provision for reasons of:

A) lack of container at the particular time,

B) vessel capacity,

C) failure of customer to pay previous charges, and

D) lack of labor.

Statement of Facts not in Dispute, paras. 44, 45. Defendant argues that if it had supplied containers in violation of the ILA agreement, a general strike by the ILA which could have closed the port might have ensued. This threat, defendant urges, justified its denial of containers in adherence to its labor agreement. I find this position to be untenable.

Any ambiguity in a tariff must be construed against the carrier since the carrier drafted the tariff. *Chicago & N.W. Ry.* v. *Hunt-Wesson Foods*, 504 F.2d 905, 908 (7th Cir. 1974); *Penn Central Co.* v. *General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971). It is entirely reasonable, and consistent with the general policy aimed at assuring the public adequate carrier service, to construe Item 570 of defendant's tariff as vesting no discretion in the defendant to deny consolidators requested containership services, within the bounds of reasonable possibility. A carrier is not required to perform the impossible. "(T)he law, of course, exacts only what is reasonable from a carrier." *Minneapolis & St. L. Ry.* v. *Pacific Gamble Robinson Co.*, 215 F.2d 126, 134 (8th Cir. 1954). It is evident from the facts of this case that the defendant, in denying containership services, was not constrained by factors which rendered its performance impossible. The parties have stipulated that prior to March 1973, the defendant had routinely made containers available to consolidators. Statement of Facts not in Dispute, para. 30. They have also stipulated that notwithstanding defendant's present assertion that Item 570 of its tariff vests it with dis-

certion to deny containership services, this provision had never been exercised with regard to Consolidated Express, Inc. before March 1973. Id., para. 32. It is evident that the defendant denied containership services solely in reliance on its labor agreement and the belief that its tariff authorized such conduct. Inasmuch as a labor agreement cannot relieve a carrier from performing its duties, even where there exists the threat of a strike, *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F.Supp. 475, 516 n.92 (D. Ore. 1953), that belief was unfounded. I, therefore, find that by denying containership services to consolidators, the defendant failed to observe the provisions of its tariff then in effect, in violation of 46 U.S.C. § 844.[2]

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[2] This finding is not disturbed by the fact that at the time relevant to this case Consolidated Express, Inc. may or may not have been engaged in consolidation activities without an appropriate license from the Interstate Commerce Commission. There may be situations where a carrier with actual knowledge of wrong-doing by a shipper may be justified, or obligated to withhold carrier services. See, e.g., *North American Van Lines, Inc.* v. *Heller*, 371 F.2d 629 (5th Cir. 1967) (where carrier had actual knowledge that one tendering goods for shipment was not in rightful possession of such goods, carrier was not bound to receive the property for shipment). There is no evidence in the instant case that the defendant had such actual knowledge of possible wrongdoing by Consolidated Express, Inc. at the time it withheld requested containers, nor any evidence that if it had such knowledge, it denied containers in reliance thereon. To the contrary, the defendant has stipulated that it denied containers in reliance on its labor agreement and its tariff on file with the FMC.

IV

The next issue to be resolved is whether the acts of the defendant constitute a continuing violation of 46 U.S.C. § 844 so as to render it liable for daily penalties for the 151-day period in question, or whether these acts constitute a series of periodic violations rendering it liable for a penalty for each documented act of refusing to supply requested containers. Precisely what constitutes a continuing violation within the meaning of 46 U.S.C. § 844 has not been judicially determined. This question has been dealt with in the context of another civil penalty statute, 15 U.S.C. § 45(*l*), which penalizes violations of Federal Trade Commission cease and desist orders. In *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), the Supreme Court held that the acquisition by the defendant of the assets of certain businesses in violation of a FTC order constituted a continuing violation of 15 U.S.C. § 45(*l*) so long as the assets were retained. In dictum, the court indicated that continuing violations would also include continuing conspiracies to fix prices or control production, maintenance of a billboard in defiance of an order prohibiting false advertising, failure to dissolve an illegal merger, and failure to eliminate an interlocking directorate. Id. at 231. Each of these violations injure the public and inure to the benefit of the violator until an act of abatement is taken. On the other hand, it has been held that there is no continuing violation in a situation involving price discrimination by means of illegal discounts, where each discrimina-

tory transaction was an independent and separately identifiable act. *FTC* v. *Consolidated Foods Corp.*, 396 F. Supp. 1353 (S.D.N.Y. 1975).

I find the facts of this case to be more akin to the situation in *Consolidated Foods* than to the examples listed by the Supreme Court in *ITT Continental Baking*. The parties herein have stipulated that actual requests for containers which the defendant failed to honor consist of "approximately five telephone calls, confirmed by telegrams, by Consolidated Express, Inc. for one or two containers." Statement of Facts not in Dispute, para. 38. The parties have also stipulated that during the first six months of 1973 the defendant paid $102,000 in penalties allegedly for providing containers to consolidators in violation of the ILA agreement. Id., para. 21. In my mind, this is sufficient to indicate that each decision to supply or withhold requested containers was an independent act. I, therefore, find no continuing violation of 46 U.S.C. § 844 on the facts of this case. I find that each of the five occasions to which the parties have stipulated that the defendant denied containers to Consolidated Express, Inc. constitutes a single violation of 46 U.S.C. § 844.

V

The amount of penalties to be assessed for each violation by the defendant is a matter within the court's discretion. Factors commonly taken into account in assessing civil penalties include the good or bad faith of the violator, the ability of the violator to pay, the degree of public injury engendered by the

violations, and the degree to which the violator profited from his acts. See *FTC* v. *Consolidated Foods Corp.*, supra, 396 F. Supp. at 1356-57. However, civil penalty statutes should be applied in a manner which promotes their deterrent effect. See *United States* v. *ITT Continental Baking Co.*, supra, 420 U.S. at 231-32. Indeed, when the punitive provision of 46 U.S.C. § 844 was amended in 1972 to provide for civil rather than criminal penalties, Congress sought to maximize the deterrent value of the statute. S. Rep. No. 92-1014, 92d Cong., 2d Sess. *reprinted in* [1972] U.S. Code Cong. & Ad. News 3121. Taking the above factors into account, I find it appropriate to assess the defendant a penalty of $1,000 for each of its five violations. Judgment is, therefore, rendered in favor of the United States in the amount of $5,000.

The United States should submit an appropriate order.

DATED: January 13, 1977.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-1664

UNITED STATES OF AMERICA, PLAINTIFF,

against

SEA-LAND SERVICE, INC., DEFENDANT

FINAL JUDGMENT

This action having duly come on for trial before the Court, the Honorable H. Curtis Meanor, District Judge, presiding, and the Court, after due deliberation having rendered its decision in writing on January 13, 1977, the Court having decided that the defendant, Sea-Land Service, Inc. was in violation of Section 844, Title 46, U.S. Code on five separate occasions, having assessed a penalty in the sum of $5,000 for the aforesaid, violations, it is

ORDERED AND ADJUDGED that the United States of America recover of and from the defendant, Sea-Land Service, Inc. the sum of $5,000, with interest to be computed from the date of this judgment and costs.

Dated: Newark, New Jersey
Mar. 16, 1977

/s/ H. Curtis Meanor

U.S.D.J.

We hereby consent to the entry of the foregoing judgment.

JONATHAN L. GOLDSTEIN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza, Room 4048
New York, New York 10007
Attorneys for Plaintiff

By: /s/
WARREN A. SCHNEIDER
RAGAN & MASON
Attorneys for Defendant

By: /s/ Gerald A. Malia
GERALD A. MALIA

[Original Filed Mar. 17, 1977
Angelo W. Locascio, Clerk]

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
OFFICE OF THE CLERK
Newark, N.J. 07102

Civil Action No. 74-1664

UNITED STATES OF AMERICA

v.

SEA-LAND SERVICE, INC.

There was entered on the docket on 3-22-77 consent (judgment) for $5,000. with costs.

ANGELO W. LOCASCIO
Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-1664

UNITED STATES OF AMERICA, PLAINTIFF,

against

SEA-LAND SERVICE, INC., DEFENDANT.

(Meanor, J.)

SATISFACTION OF JUDGMENT

WHEREAS a final judgment was entered on March 22, 1977, providing that plaintiff, United States of America, recover of and from defendant, Sea-Land Service, Inc., the sum of $5,000, plus interest and cost, and

WHEREAS said judgment and interest having been paid, and no cost having been entered,

THEREFORE, satisfaction of said judgment is hereby acknowledged, and the Clerk is hereby authorized and directed to make a proper entry of said satisfaction in the judgment docket.

Dated: New York, New York
May 13, 1977

JONATHAN L. GOLDSTEIN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
Attorney for Plaintiff, USA

BY: /s/
WARREN A. SCHNEIDER

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 13th day of May 1977, before me personally came Warren A. Schneider, Department of Justice, Admiralty & Shipping Section, representing the United States of America, to be known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged that he executed the same.

GILBERT S. FLEISCHER
Notary Public, State of New York

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
H. Curtis Meanor
Judge

311 United States Court House
Newark, N. J. 07101

May 13, 1977

RE: United States of America
v. Sea-Land Service, Inc.
Civil Action No. 74-1664

Warren A. Schneider, Esq.
U. S. Department of Justice
Admiralty and Shipping Section
26 Federal Plaza
New York, New York, 10007

Carol J. Henstadt, Esq.
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C., 20573

Jeffrey L. Reiner, Esq.
Meyner, Landis & Verdon
Gateway 1
Newark, New Jersey, 07102

Gerald A. Malia, Esq.
Ragan & Mason
900 Seventeenth Street, N.W.
Washington, D.C., 20006

Dear Counsel:

In response to Mr. Schneider's letter dated May 11, 1977, regarding the timeliness of the Govern-

ment's motion under Rule 52(b) in the above captioned matter, I have inspected the docket sheet of this case which is maintained by the Clerk of this Court. A copy of a portion of that docket sheet is included herewith. The docket sheet clearly reflects that the judgment constituting the subject matter of the Government's motion was indeed recorded on the docket sheet, and thus, for Rule 52(b) purposes, was "entered," on March 22, 1977. See Fed. R. Civ. P. 79(a) (requiring the Clerk to maintain "civil dockets"); Fed. R. Civ. P. 58 ("A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."). Since the Government's motion was filed with the Clerk of the Court on April 1, 1977, there can be no question that the 10-day time limit set by Rule 52(b) was met. Any comments by me in my oral opinion rendered May 9, 1977, to the contrary, see Tr. 5/9/77, at 5-7, 13-14, are to be disregarded as this letter is intended to amend that opinion. My comments at that time were predicated on the notion that a judgment order signed by me March 16, 1977, and filed in the Clerk's office the next day (March 17), would be entered onto the civil docket maintained in that same office on the date of filing, and not five days later. That motion was clearly erroneous in this case. As a result, the oral opinion of the Court of May 9, 1977 is hereby amended to deny the Government's motion for the reasons then stated which go to the merits of the issue raised. Defendant should submit an order consistent with the Court's oral opinion as modified by this letter.

The original of this letter will be filed by the Court.

Very truly yours,

/s/ H. Curtis Meanor
H. CURTIS MEANOR
U.S.D.J.

HCM:el
Enc.

APPENDIX H

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

SEA-LAND SERVICE, INC., DEFENDANT-APPELLEE

AFFIDAVIT OF WARREN A. SCHNEIDER

CITY AND COUNTY OF SAN FRANCISCO)
) ss
STATE OF CALIFORNIA)

1. I, Warren A. Schneider, was the attorney for the Government on the trial of this action in the United States District Court for the District of New Jersey.

2. After oral argument at trial on the stipulated facts, the District Court decided that the United States was entitled to recover $5,000 representing the maximum $1,000 per violation penalty for violation of the Shipping Act. The Court rejected the Government's contention that the conduct of Sea-Land constituted a continuing violation of the statutes. The Court ordered that the Government submit an appropriate order.

3. After the Court's decision, I had a couple of telephone conversations with Gerald A. Malia, defendant's counsel, concerning the decision. I indicated at that point that we were considering the possibility of either requesting reconsideration by the District Court or appealing directly to the Court of

Appeals for the Third Circuit. I indicated that we would probably file a notice of appeal within the required time frame after entry of judgment pending a final decision by the appropriate officials of the Department of Justice as to whether or not an appeal should be perfected.

4. Subsequently, I prepared a proposed form of judgment stating the decision by the District Court awarding the Government recovery of $5,000 penalty, which as a matter of fact, though not expressly stated, obviously denied full recovery of the Government's claim for $151,000 in civil penalties. While undoubtedly inartistically stated, the judgment was intended to show that counsel agreed to the statement of the Court's decision and did not consent that the $5,000 award was in full settlement of the Government's complaint. As drafted, the document was entitled "Final Judgment" as distinguished from the normal terminology of "Consent Judgment" used when agreement is reached between counsel rather than as an expression of the District Court's opinion. When the Government subsequently moved within the ten day time limit for reconsideration of this judgment, defense counsel did not raise the issue that the Government was barred due to the entry of a consent judgment, thus clearly manifesting their understanding based on previous conversations that the judgment entered by the Court upon "consent" of the parties did not indicate that the Government in fact agreed with the District Court's determination as to the maximum allowable penalties.

5. At oral argument of the motion for reconsideration, the Court commented that it had questions as to whether or not it had jurisdiction because of the entry of the so-called consent judgment, but did not decide the motion for reconsideration on that basis, nor was it urged to do so by defendant's counsel.

6. After oral decision by the District Court denying the Government's motion for reconsideration, Jeffrey Reiner, one of the counsel for the defendant, stated to me that they would appreciate it if we would accept payment of the $5,000 that was clearly not in dispute, plus whatever interest was payable, to avoid the continuing running of interest expenses. I stated to Mr. Reiner that I understood his desires and would be willing to consent to that with the understanding that it did not preclude us from filing an appeal. I indicated at that point that, while such a determination would have to be made by other officials in the Department of Justice, I would recommend that an appeal be taken and that I understood that the Federal Maritime Commission would also so recommend. Mr. Reiner indicated that he understood our position. On that basis, I agreed that payment could be made solely to prevent additional costs to the defendant. When payment was received, satisfaction of that payment was acknowledged without any intended implication that it was full satisfaction of the judgment that the Government was ultimately entitled to.

7. Admittedly, the pleadings entered in the District Court could have been more appropriately

phrased. There was, however, no intent at any time by the Government to acknowledge any agreement with or acceptance of the decision by the District Court in this case. I am of the firm conviction that no such intent was ever communicated to counsel for the defendant and I am also of the firm conviction that they were fully aware throughout that I myself, and counsel for the Federal Maritime Commission, disagreed with the District Court's opinion and that no actions by me were in any way intended to preclude the Government from moving for reconsideration or appealing the decision of Judge Meanor.

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